No. 86-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT DEPOSIT GUARANTY NATIONAL BANK IN OPPOSITION

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QUESTION PRESENTED

The National Bank Act, 12 U.S.C. § 36, provides that national banks may branch wherever the state authorizes "state banks" to branch. Section 36(h) defines "State bank" as follows:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

The question presented by this case is whether the Comptroller correctly construed this statute to extend to national banks in Mississippi branching rights equivalent to those of state-chartered savings associations that, under the authority of Mississippi law, call themselves savings banks and carry on the banking business statewide by receiving deposits, making commercial loans, and negotiating checks and drafts.

RULE 28.1 LIST

The parent companies, subsidiaries or affiliates of respondent Deposit Guaranty National Bank are as follows:

Deposit Guaranty Mortgage Company
Consurve, Inc.
Deposit Guaranty Foundation
Parking Services, Inc.
DGEP, Inc.
Deposit Guaranty Corp.
DGC Services Company
Deposit Guaranty Financial Services, Inc.
Deposit Guaranty Investments, Inc.
Deposit Guaranty Omaha, N.A.
Credit Life Agency, Inc.
Deposit Guaranty Bank Securities Corporation
Guaranty Insurance Agency, Inc.
Guaranty Leasing Company

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

Statutes:

TABLE OF AUTHORITIES—Continued

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Respondent Deposit Guaranty National Bank ("Deposit Guaranty") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's judgment in this case.

STATEMENT OF THE CASE

The facts are well stated in the Fifth Circuit's opinion, *Department of Banking and Consumer Finance v. Clarke*, 809 F.2d 266, 267-269 (5th Cir. 1987), App. 36a-40a.

The petitioner Department of Banking and Consumer Finance ("petitioner") commits a serious factual error in its Statement, an error which is repeated throughout

the Petition, from the Question Presented to the last footnote on the last page.

It is undisputed in the administrative record, the findings of the Comptroller (App. 16a-20a), and as a matter of both state and federal law that Mississippi charters as "banks" not only the institutions petitioner regulates, but also institutions regulated by the State Department of Savings Associations. Despite this undeniable fact, petitioner repeatedly uses the terms "state banks," or "state-chartered banks" as if the only such institutions in Mississippi were those petitioner regulates. That was true prior to 1980, but is no longer true today.

Prior to 1980, the only institutions in Mississippi chartered as banks by the state were state commercial banks regulated by petitioner. These were the only state institutions that could call themselves "banks." Miss. Code § 81-3-3 (1972). They were restricted from branching more than 100 miles from their principal office. See Miss. Code §§ 81-7-5 and 81-7-7 (1972). Because of statutory changes made by the legislature after this suit was filed but before the Fifth Circuit's decision, they will be able to branch statewide with certain exceptions on July 1, 1989. Miss. Code § 81-7-7 (Supp. 1986).

Beginning in 1980, the Mississippi legislature by statute and the Mississippi Department of Savings Associations by regulation created a second kind of financial institution chartered by Mississippi as banks. Not only can these institutions carry on the traditional powers and functions of banks, including receiving deposits, making commercial loans, and negotiating checks, they may and do charter themselves as "savings banks." App. 37a-38; *See* Administrative Record ("A.R.") 294 (advertisement for "First Jackson Savings Bank"). Significantly, Mississippi's savings banks operate with a greater freedom than do federal savings banks. They need not finance a single home purchase and may have a purely commercial

loan portfolio.[1] They may and do now branch anywhere in the State without geographical restriction. Miss. Code § 81-12-175 (Supp. 1986).

The Petition ignores every post-1980 development in Mississippi law and describes this case to the Court as if petitioner were a Rip Van Winkle awaking after a seven-year slumber. Ignoring both the now-common title "savings bank" and the statutory name "savings association," Miss. Code § 81-12-1 et seq. (Supp. 1986), petitioner resorts to the quaint description of these institutions as mere "savings and loans." The Petition repeatedly makes statements that are simply not true, or at best assume what they seek to prove. The Petition asserts that only one statute governs "state chartered banks," Pet. at 3, and that the branching sought by Deposit Guaranty "would not have been permissible for any of Mississippi's state-chartered banks," Pet. at 4.[2] These

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[1] Federal savings associations may have 90 per cent of their assets in commercial type investments. Vartanian, *The Garn-St Germain Depository Institutions Act of 1982: The Impact on Thrifts*, 2 Housing Fin. Rev. 167, 173-174 (1983). Petitioner's comment concerning the "traditional housing financing role" of federal savings associations, Pet. 7 n.4, ignores this reality of the new law, and, in any event, has no application to Mississippi. Mississippi savings banks may invest up to 25% of their assets in certain commercial loan obligations and are not bound by the 10% federal limit on such loans. Compare Miss. Code § 81-12-155 (b) (Supp. 1986), *with* 12 U.S.C. § 1464(c)(1)(R) (Supp. 1986). As a result, Mississippi savings banks may have *all* of their assets in commercial type investments, and need not have a single housing loan.

[2] As stated, this error permeates the Petition. See, e.g., pp. (i) ("branching that is prohibited by state law for state banks"), 5 ("provision of Mississippi law governing the chartering and operating of state-chartered banks"), 10 ("state law does not permit 'state banks' to engage in the branching sought"), 13 ("states would be forced to expand branching privileges for state-chartered banks"), 14 n.7 ("will extend the geographic scope of permissible branching by state banks"). Each of these statements is true only with respect to state-chartered banks regulated by

statements are true for those institutions regulated by petitioner. They are not true for the institutions chartered as banks by petitioner's rival, the Department of Savings Associations.

In Mississippi, savings associations are indisputably carrying on the banking business and are authorized by the state to do so statewide. It is for this reason that both the Comptroller and the Fifth Circuit found that national banks in Mississippi may branch statewide in order to ensure competitive equality under 12 U.S.C. § 36(h).

REASONS WHY THE WRIT SHOULD BE DENIED

1. There is No Other Court of Appeals Decision Concerning the "Banking Business" in Issue Here. There is No Circuit Conflict that Would Warrant a Grant of Certiorari.

The issue on the merits here is whether the Comptroller of the Currency correctly construed the National Bank Act, 12 U.S.C. § 36, to extend to national banks in Mississippi branching rights equivalent to those of state-chartered savings institutions authorized by Mississippi to carry on the banking business statewide.

The Act provides that national banks shall have competitive equality with "state banks" insofar as branching is concerned. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966) ("*Walker*

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petitioner. It is not true with respect to other state-chartered banks. For example, petitioner's statement of the question presented, to be accurate, should be restated as follows:

> The question presented is whether a national bank may engage in branching that is prohibited by state law for State banks *regulated by petitioner*, on the ground that such branching is permitted for *state banks regulated by another state agency*, thereby placing *national* banks in a position of competitive *equality* with *state banks regulated by that other agency* in the matter of branching.

Bank"); *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*). The Act defines "state bank" in § 36(h) as follows:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

The Fifth Circuit held that the Comptroller acted within his authority in finding that Deposit Guaranty is entitled to branching rights equal to those of Mississippi savings institutions, because those institutions are authorized by the State to call themselves "banks" and to engage in the "banking business." They are thus "state banks" and the Act guarantees national banks branching equality with them.

The construction of the words "banking business" was crucial to the Fifth Circuit's holding and the Comptroller's determination. The court held that construction of § 36(h) was a matter of federal law, and affirmed the Comptroller's interpretation that:

> [T]he banking business, reduced to essentials, involves receiving deposits, making commercial loans, and negotiating checks and drafts. 809 F.2d at 268; App. 37a.

The Fifth Circuit upheld the Comptroller's finding that Mississippi had authorized savings institutions with statewide branching powers to engage in these activities. Specifically, the court upheld the finding that Mississippi savings institutions may receive and pay interest on savings deposits and other accounts, may offer interest-bearing checking accounts, and may make commercial loans. The court agreed with the Comptroller's conclusion that national banks in Mississippi were entitled to branch statewide in order to ensure competitive equality. *See* 809 F.2d at 268.

Petitioner contends that the Fifth Circuit's decision conflicts with the decisions of two courts of appeals and two district courts. In fact, however, none of those decisions involved the "banking business" found here and each is factually distinguishable. There is no conflict because the decisions are not concerning the "same matter." Sup. Ct. R. 17.1(a).

a. *The decisions cited were not regarded as conflicting by the lower courts.*

i. *The District Court did not believe those cases were on point here.*

The District Court, which on other grounds ruled in favor of the petitioner, specifically rejected petitioner's claim that these decisions were on point here. The Court said, *Department of Banking and Consumer Finance v. Selby*, 617 F. Supp. 566, 571 n.15 (S.D. Miss. 1985):

> This court is of the opinion that the substantive analyses utilized in these cases is not controlling for each case fails to address directly the question in issue here.

ii. *The Fifth Circuit's opinion does not mention the decisions.*

Petitioner briefed these decisions and made them the subject of oral argument in the Fifth Circuit. The Fifth Circuit did not find it necessary to mention these decisions in its opinion.

iii. *Petitioner did not seek en banc review in the Fifth Circuit.*

Mindful of this Court's caseload, the Fifth Circuit has adopted procedures that favor en banc review of decisions that conflict with decisions of other circuits. Its Internal Operating Procedure to Fed. R. App. P. 47 provides that when its opinions "initiate an express conflict with the law in another circuit," they are to be circulated

en banc before release, and "are subject to polling procedures for en banc consideration should any judge request it."

Here not only was there no express conflict, but the petitioner did not seek to avail itself of the ordinary en banc review procedure, which was available to it to attempt to persuade a majority of the Fifth Circuit that the decisions were in conflict. *See* Fed. R. App. P. 35. Petitioner bypassed that opportunity and should not now be heard to seek the extraordinary remedy of certiorari in this Court.

b. *The decisions did not involve the "banking business" found here.*

It was critical to the Fifth Circuit's decision that Mississippi savings institutions are engaged on a statewide basis in the business of banking, including i) offering commercial loans, ii) paying interest on savings deposits, and iii) offering checking accounts to some customers. Petitioner is mistaken in claiming that the Fifth Circuit held broadly that a national bank could branch anywhere "other state financial institutions" could branch. *See* Pet. at 7 (emphasis omitted). The Fifth Circuit's narrow holding turns on a finding that these three services are offered by Mississippi savings associations. The cases on which petitioner relies do not involve these services. The decisions are distinguished not only in the Comptroller's decision, Pet. App. 8a-12a, but also in the literature. *See*, Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. of L. & Com. 243, 252-253 (1983).

In *Mutschler v. Peoples National Bank*, 607 F.2d 274, 279-280 (9th Cir. 1979), the Ninth Circuit held that a national bank could not branch statewide in Washington even though certain state institutions called "mutual savings banks" could branch statewide. There is no suggestion in the opinion that mutual savings banks in Wash-

ington were authorized to engage, or *in fact* were engaged in the banking business by, for example, i) offering checking services or ii) making commercial loans. *See also, State Chartered Banks in Washington v. Peoples National Bank*, 291 F. Supp. 180, 198-199 (W.D. Wash. 1966).

In *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345, 355-356 (8th Cir. 1977), *cert. denied*, 434 U.S. 877 (1977), the court rejected a contention that a national bank should be able to branch statewide because a state-*owned* bank, the Bank of North Dakota, had that power. There is no contention in this case that Mississippi savings institutions are state-owned. In fact, *Dakota National Bank* supports the Fifth Circuit's holding because there the Eighth Circuit concluded that "competitive quality [sic] was intended to be maintained between the privately-owned banking institutions." 554 F.2d at 356.

In *First National Bank & Trust Co. of Okmulgee v. Empie*, No. 78-296-C (E.D. Okla. November 15, 1982) (A. R. 424-434), the court rejected a contention that national banks in Oklahoma should be able to branch statewide because of the powers the State gave to a "trust company." The court held both that trust companies in Oklahoma were not in the banking business and that they did not have the authority to branch statewide. Opinion at 6 n.2, 8-9 n.4 (A.R. 429, 431-432).

In sum, none of these cases involved competition between national banks and state-chartered institutions "carrying on the banking business." None involved state-chartered financial institutions that branched statewide and offered not only i) deposit services, but also ii) checking and iii) commercial loans to their customers. The Fifth Circuit found it to be controlling that state-chartered savings associations in Mississippi are engaged in each of these aspects of the "banking business." Because the allegedly conflicting decisions did not involve

the "same matter" as the Fifth Circuit's opinion, there is no conflict of decisions within the meaning of the rules of this Court.

2. The Fifth Circuit's Decision is Consistent with Walker Bank and Plant City.

Both the Comptroller, App. 5a-8a, and the Fifth Circuit, 809 F.2d at 269-270, App. 40a-41a, considered this Court's prior decisions and accurately applied them here.

In *Walker Bank*, this Court held that a national bank in Utah could not branch except under the terms state law permitted state banks to branch. State law prohibited branching in a home municipality except by merger. 385 U.S. at 261. The Court held that national banks could not branch de novo and must also limit themselves to branching by merger. *Id.*

In this case the branching powers of Mississippi savings banks have no such limits. The principle of competitive equality applied in *Walker Bank* supports the decision of the Comptroller to permit Deposit Guaranty to branch where those banks can branch.

Petitioner seeks to place a gloss on *Walker Bank* by construing it to require that Deposit Guaranty "meet the Mississippi requirements for designation as a savings and loan [sic]," Pet. at 10-11, before it can branch. This is incorrect. *Walker Bank* held that a national bank must comply with state law specifically regulating branching. It did not require the national bank to comply with any state regulation other than the law restricting branching. 385 U.S. at 261. As § 36(c) states, it is the "*restrictions as to location* imposed by the law of the State" (emphasis added) which matter. The Question Presented by petitioner concedes that under § 36(c) a national bank may branch "if it meets the *branching restrictions* imposed by that state's law" (emphasis added). Nothing in § 36 or in *Walker Bank* requires a national bank to meet any restrictions other than those on branching. Here there are no restrictions on savings associations branching that would prevent a branch from opening.

Petitioner contends that the Fifth Circuit's decision is contrary to *Plant City* because it upsets "competitive equality" between state commercial banks and national banks. That case, however, did not involve a state banking system that permitted one group of state institutions in the banking business to branch statewide while another group could not. Nothing in the National Bank Act forbids Mississippi from discriminating against one set of its banking institutions; but Mississippi may certainly not discriminate against national banks.

The Fifth Circuit discussed *Walker Bank* and *Plant City* at length, and reasoned that the Comptroller's decision here in fact promoted competitive equality, 809 F.2d at 269-270, App. 41a. The court said:

> The principle of competitive equality guided the Comptroller's analysis and informed his decision in the present case. He observed that "the concept of competitive equality requires a federal definition of 'State bank' to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions 'banks' and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks."
>
> We conclude that the Comptroller's use of federal law and the competitive equality standard was legally correct. By doing so the Comptroller was faithful to the congressional mandate and demonstrated considerable expertise in balancing national and state interests in this constantly evolving area.

Moreover, the Fifth Circuit followed *Plant City*, 396 U.S. at 133-134, in holding that § 36 is to be construed as a matter of federal, not state law.[3] Its decision is in complete harmony with the precedents of this Court.

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[3] *Plant City* expressly rejected the contention that § 36(c) and (f) should be construed as a matter of state, not federal law. In so holding, the Court rejected the argument of petitioner's present

3. Mississippi has now Altered the Statutes on which Petitioner Relies.

On April 14, 1986, while this case was pending on appeal, Mississippi adopted legislation altering the branching laws applicable to banks regulated by the petitioner Department of Banking. The statute phases out the 100-mile limit for branching by state commercial banks which is replaced by statewide branching on July 1, 1989. Miss. Code § 81-7-7(5) (Supp. 1986). During the interim periods, state commercial banks may accomplish statewide branching through mergers subject to certain asset limitations. Miss. Code § 81-7-8(3) (Supp. 1986).

These changes do not moot this case. The Gulfport branch Deposit Guaranty seeks to open is more than 100 miles from Jackson, and so exceeds current limits for a state bank regulated by petitioner. Also, the new statute does not give the banks petitioner regulates complete equality in branching with the banks regulated by the Department of Savings Associations. *Compare* Miss. Code § 81-7-8 (Supp. 1986) *with* Miss. Code § 81-12-175 (Supp. 1986).

This case would, however, be a poor vehicle for consideration of the issues petitioner seeks to raise. Prudence suggests that certiorari be denied in this case and the issue dealt with, if necessary at all, in a case from another state.

Petitioner claims that this decision will affect 21 states other than Mississippi whose statutes grant "savings and loan associations" broader branching rights than "banks." Pet. 11-12 & n.6. Petitioner offers no proof that i) these states permit state savings institutions to engage in the banking business as found here, ii) that such institutions exist in those states and iii) that they in fact branch statewide. Even if this were shown, all 21 states differ

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counsel, who appeared there on behalf of the National Association of Supervisors of State Banks. 396 U.S. at 133-134.

from Mississippi in that they now permit the use of multibank holding companies, a device by which national banks may operate statewide without using branches.[4] In any case, if there is an impact in another state, the question can be addressed in the event another Court of Appeals disagrees with the Fifth Circuit on facts similar to those presented here.

4. Other Courts of Appeals are Likely to Follow the Fifth Circuit if and when this Issue is Presented to Them.

It is likely that if and when the other Courts of Appeals are called to consider this issue, they will agree with the Fifth Circuit.

a. This Court's recent decisions strongly support the Fifth Circuit's holding.

In *Board of Governors v. Dimension Fin. Corp.*, 106 S. Ct. 681 (1986), this Court addressed a "simple and broad definition" of "bank" formerly found in 12 U.S.C. § 1841(c). That definition was:

> [A]ny national banking association, or any State bank, savings bank or trust company.

This Court said that this broad language would include not only commercial banks but also institutions which offered only limited checking account services and did not make commercial loans. See 106 S. Ct. at 684-685. The Court also emphasized the need for judicial deference to the plain meaning of statutes. 106 S. Ct. at 686-689.

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[4] *Compare* Pet. 12 n.6 *with* A. R. 230 (chart showing multibank holding companies in every listed state except Illinois, Indiana, and Kansas). Since the proceedings before the Comptroller, Illinois, Indiana, and Kansas have each passed statutes permitting the formation of multibank holding companies. *See* Ill. Ann. Stat. ch. 17, pars. 2501-2513 (Smith-Hurd 1982 & Supp. 1986); Ind. Code Ann. §§ 28-2-14-1 to -17 (Burns Supp. 1986); Kan. Stat. Ann. §§ 9-519 to -524 (Supp. 1986).

As applied here, *Dimension Financial* supports a reading of § 36(h) that would be even broader than that adopted by the Comptroller. It suggests that a state institution could be a "state bank" under § 36(h) without offering all the services the Comptroller found essential here. Petitioner's argument for a definition of § 36(h) even narrower than that chosen by the Comptroller directly contravenes *Dimension Financial*.

Moreover, in *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 762 n.23 (1987), this Court expressly rejected as "extreme" an argument that national banks must be identical to state banks with respect to activities other than branching of core banking functions. The Court emphasized deference to the Comptroller's construction of federal statutes concerning the banking business. *Id.* at 759-762. Petitioner overlooks that holding here and urges the Court to ignore the principle of deference.

Both *Dimension Financial* and *Securities Industry Association* lend strong support to the Fifth Circuit's reliance on the plain language of the statute and its deference to the Comptroller's construction of the National Bank Act. They make conflicting decisions from other Courts of Appeal unlikely.

b. *The legislative history supports the Fifth Circuit's decision.*

The Fifth Circuit did not discuss the legislative history of § 36(h). In view of this Court's admonition in *Dimension Financial* that plain language controls over ambiguous legislative history, the Fifth Circuit's choice is hardly surprising. Moreover, there is no legislative history that speaks directly to the definition of § 36(h). It is correct to say, however, that the legislative history generally supports certain propositions.

First, Congress intended in the McFadden Act of 1927, as revised by the Banking Act of 1933, that national

banks have competitive branching equality with the institutions that competed with them, however denominated. Congress was familiar with the term "commercial bank" and did not choose to limit the definition of § 36(h) to commercial banks. See, e.g., 66 Cong. Rec. 1776 (1925).

Section 36(h) is a functional definition. During the drafting of the Bank Act of 1933, Dr. H. Parker Willis served as a technician and advisor to the Senate Committee on Banking and Currency. Dr. Willis was a professor in the business school at Columbia University and was charged by the committee to serve as its "expert draftsman." 75 Cong. Rec. 10070-10072 (1932). In 1935, Dr. Willis published an article in the Columbia Law Review concerning the Banking Act of 1933. Willis, *The Banking Act of 1933 in Operation*, 35 Colum. L. Rev. 697 (1935). Concerning branch banking, he stated:

> The framers of the act had originally intended to make a very liberal provision for the extension of branch banking but this action was out of the question because of the continuous opposition of the small banks and of those legislators who represented them to any such measure. *It was, however, only a provision of ordinary justice to say to the national banks that they might engage in branch banking to the extent permitted to their competitors, organized under state law, whom they were obliged to meet in open market*, and who should obviously not be better treated than they.

35 Colum. L. Rev. at 703. (Emphasis added). As Justice Stevens said in his concurrence in *Securities Industry Ass'n*, § 36 was to enable national banks "to effectively compete with state banks that could legally branch." 107 S. Ct. at 766.

Second, the legislative history demonstrates that Congress intended that the powers of national banks would expand as legislatures expanded state laws. Petitioner argues that the statutory purpose was to "freeze" branch-

ing "in its status quo," Pet. at 13, but this contention rests on a quotation petitioner takes entirely out of context. *See* J. Chapman & R. Westerfield, *Branch Banking* 108 (1980 reprint) quoted in *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 764 n.3 (1987) (Stevens, J., concurring). The remark quoted explains opposition to the 1927 Act, which did not permit branching outside city limits. It does not apply to the Act as amended in 1933 and as in effect today.

In fact, this Court has twice held that Congress intended changes in state law to produce corresponding changes in the powers of national banks. In *Plant City*, 396 U.S. at 133, this Court said:

> The policy of competitive equality is therefore firmly imbedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and *build into the federal statute a self-executing provision to accommodate to changes* in state regulation. (Emphasis added.)

See also, Walker Bank, 385 U.S. at 258. Here Mississippi has changed its state regulation and there must be a corresponding effect on the authority of national banks to engage in branching.

Future courts of appeals which consider this legislative history will no doubt be persuaded that it strongly supports the Comptroller's position. To counsel's knowledge, this is the first case in which a court of appeals has had before it a complete survey of the legislative history of § 36(h) by counsel supporting the Comptroller.

c. *The dictum in one decision relied on by petitioner is plainly wrong.*

Petitioner relies on certain language in *Mutschler v. Peoples National Bank*, 607 F.2d 274, 279-280 (9th Cir. 1979) in which the Ninth Circuit opined that a national bank could not branch statewide in Washington if it

could not satisfy the state definition of "mutual savings bank." Under the Ninth Circuit's logic in *Mutschler*, a national bank would have to have all the attributes of a "savings bank" before it would be entitled to competitive equality under § 36(h).

This logic is plainly wrong for two reasons not considered by the *Mutschler* court.

First, under § 36(c) it is only the state "restrictions as to location" which apply to national banks, not restrictions on organizational form.

Second, Congress knew in 1933 that national banks were not, and could not be, savings banks or trust companies. Despite that knowledge, Congress provided in § 36 that national banks could branch wherever state law authorized trust companies or savings banks to branch. The *Mutschler* dictum imposes on § 36 branching rights a restriction that Congress could *never* have intended national banks to meet.

For example, savings banks, usually mutually owned by their depositors, historically concentrated on long-term lending in the home mortgage market. Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 Am. U.L. Rev. 633, 645-650 (1980). National banks must be stock institutions, 12 U.S.C. § 26, and until 1964 could not offer mortgages more than five years in length. *Fein*, 29 Am. U.L. Rev. at 643; Housing Act of 1964, Pub. L. No. 88-560, § 1004, 78 Stat. 769. A savings bank could not even get a federal charter until 1978. See Pub. L. No. 95-630, amending 12 U.S.C. § 1462(d), 92 Stat. 3710. Conversely, a federal institution could not bear the name "savings bank" prior to 1978.

Trust companies were originally not banks as such, but more general corporations. They originated as fiduciaries, but soon became involved in the securities business as well as banking. E. Symons & J. White, *Banking Law*

33 (2d ed. 1984). National banks have always been limited to the "banking business," 12 U.S.C. § 24(7).

Congress was aware of these differences. See 66 Cong. Rec. 4436 (1925) (Sen. Glass); 67 Cong. Rec. 2829-2830 (1926) (Rep. McFadden). In giving national banks the same branching rights as "savings banks" or "trust companies," Congress cannot possibly have intended that the national bank would be required to become a savings bank or trust company in order to enjoy those rights.

For these reasons, it is unlikely that any future court considering these issues will follow the *Mutschler* dictum.

CONCLUSION

The Fifth Circuit's decision turns on facts not found in the cases from other courts of appeals. Neither of the courts below found those cases to control the issues presented here. Both the Comptroller and the Fifth Circuit faithfully followed this Court's construction of § 36 in prior cases. The Fifth Circuit's emphasis on the plain language of the statute and its deference to the Comptroller is entirely in keeping with this Court's most recent decisions in this area. There is no conflict of decisions.

It is possible that other courts may be called on to construe similar interpretations of the Comptroller involving laws of other states. Mississippi, however, has changed its law, and this case is a poor vehicle for certiorari consideration. Also, it is likely that other courts of appeal will follow the Comptroller and the Fifth Circuit, making review by this Court unnecessary.

Deposit Guaranty respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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